

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

JOHN NEFF,  
#54213

Plaintiff,

vs.

DEBRA BROOKS, *et al.*,

Defendants.

3:10-cv-00378-LRH-VPC

**ORDER**

This is a prisoner civil rights action. The court dismissed plaintiff's complaint with leave to file an amended complaint (docket #9). The court now reviews the amended complaint (docket #11).

**I. Screening Standard**

Pursuant to the Prisoner Litigation Reform Act (PLRA), federal courts must dismiss a prisoner's claims, "if the allegation of poverty is untrue," or if the action "is frivolous or malicious," "fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2). A claim is legally frivolous when it lacks an arguable basis either in law or in fact. *Nietzke v. Williams*, 490 U.S. 319, 325 (1989). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. *Id.* at 327. The critical inquiry is whether a

1 constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. *See Jackson*  
2 *v. Arizona*, 885 F.2d 639, 640 (9<sup>th</sup> Cir. 1989).

3 Dismissal of a complaint for failure to state a claim upon which relief may be granted is  
4 provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under  
5 Section 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint. Review under  
6 Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. of America*,  
7 232 F.3d 719, 723 (9th Cir. 2000). A complaint must contain more than a “formulaic recitation of the  
8 elements of a cause of action;” it must contain factual allegations sufficient to “raise a right to relief  
9 above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965  
10 (2007). “The pleading must contain something more...than...a statement of facts that merely creates a  
11 suspicion [of] a legally cognizable right of action.” *Id.* In reviewing a complaint under this standard,  
12 the court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex*  
13 *Hospital Trustees*, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to  
14 plaintiff and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

15 Allegations in a *pro se* complaint are held to less stringent standards than formal  
16 pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S.  
17 519, 520-21 (1972) (*per curiam*); *see also Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th  
18 Cir. 1990). All or part of a complaint filed by a prisoner may be dismissed *sua sponte*, however, if the  
19 prisoner’s claims lack an arguable basis either in law or in fact. This includes claims based on legal  
20 conclusions that are untenable (*e.g.* claims against defendants who are immune from suit or claims of  
21 infringement of a legal interest which clearly does not exist), as well as claims based on fanciful factual  
22 allegations (*e.g.* fantastic or delusional scenarios). *See Neitzke*, 490 U.S. at 327-28; *see also McKeever*  
23 *v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

24 To sustain an action under section 1983, a plaintiff must show (1) that the conduct  
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1 complained of was committed by a person acting under color of state law; and (2) that the conduct  
 2 deprived the plaintiff of a federal constitutional or statutory right.” *Hydrick v. Hunter*, 466 F.3d 676,  
 3 689 (9<sup>th</sup> Cir. 2006).

## 4 **II. Instant Complaint**

5 Plaintiff, who is incarcerated at Ely State Prison (“ESP”), has sued ESP Associate  
 6 Warden of Operations (“AWO”) Debra Brooks and correctional officers Luce, Justin Perkins, and  
 7 Kirchen. Plaintiff claims the following: on January 29, 2010, officers forcefully extracted another  
 8 inmate from his cell, then “paraded” the injured inmate, inciting a series of inmate protests. During the  
 9 protest on January 31, defendant officers and other officers extracted plaintiff from his cell. Once  
 10 plaintiff was subdued, the officers held him down and beat him. Though his face was bleeding  
 11 profusely, he didn’t receive medical attention until almost 24 hours later, when he received stitches in  
 12 both eyebrows. He also suffered black eyes, severe rib pain and has experienced dizziness, blurred  
 13 vision, headaches and loss of equilibrium. Plaintiff alleges that officers had been using excessive force  
 14 and seriously injuring inmates repeatedly since January 29 and that AWO Brooks knew of the  
 15 constitutional violations and failed to act to prevent them when he was extracted from his cell and  
 16 injured on January 31. Plaintiff claims violations of his Eighth Amendment rights.

17 The Eighth Amendment prohibits the imposition of cruel and unusual punishments and  
 18 “embodies broad and idealistic concepts of dignity, civilized standards, humanity and decency.” *Estelle*  
 19 *v. Gamble*, 429 U.S. 97, 102 (1976). “[W]henever prison officials stand accused of using excessive  
 20 physical force in violation of the [Eighth Amendment], the core judicial inquiry is . . . whether force was  
 21 applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause  
 22 harm.” *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992); *see also Whitley v. Albers*, 475 U.S. 312, 320-21  
 23 (1986); *Watts v. McKinney*, 394 F.3d 710, 711 (9<sup>th</sup> Cir. 2005); *Martinez v. Stanford*, 323 F.3d 1178, 1184  
 24 (9<sup>th</sup> Cir. 2003); *Marquez v. Gutierrez*, 322 F.3d 689, 691-92 (9<sup>th</sup> Cir. 2003); *Clement v. Gomez*, 298 F.3d  
 25 898, 903 (9<sup>th</sup> Cir. 2002); *Jeffers v. Gomez*, 267 F.3d 895, 900 (9<sup>th</sup> Cir. 2001) (*per curiam*); *Schwenk v.*  
 26 *Hartford*, 204 F.3d 1187, 1196 (9<sup>th</sup> Cir. 2000); *Robins v. Meecham*, 60 F.3d 1436, 1441 (9<sup>th</sup> Cir. 1995);

1 *Berg v. Kincheloe*, 794 F.2d 457, 460 (9<sup>th</sup> Cir. 1986). When determining whether the force is excessive,  
2 the court should look to the “extent of injury . . . , the need for application of force, the relationship  
3 between that need and the amount of force used, the threat ‘reasonably perceived by the responsible  
4 officials,’ and ‘any efforts made to temper the severity of a forceful response.’” *Hudson*, 503 U.S. at 7  
5 (quoting *Whitley*, 475 U.S. at 321); *see also Martinez*, 323 F.3d at 1184. Although the Supreme Court  
6 has never required a showing that an emergency situation existed, “the absence of an emergency may  
7 be probative of whether the force was indeed inflicted maliciously or sadistically.” *Jordan*, 986 F.2d  
8 at 1528 n.7; *see also Jeffers*, 267 F.3d at 913 (deliberate indifference standard applies where there is no  
9 “ongoing prison security measure”); *Johnson v. Lewis*, 217 F.3d 726, 734 (9<sup>th</sup> Cir. 2000). Moreover,  
10 there is no need for a showing of serious injury as a result of the force, but the lack of such injury is  
11 relevant to the inquiry. *See Hudson*, 503 U.S. at 7-9; *Martinez*, 323 F.3d at 1184; *Schwenk*, 204 F.3d  
12 at 1196. Plaintiff states Eighth Amendment excessive force claims against all defendants.

### 13 **III. Conclusion**

14 **IT IS THEREFORE ORDERED** that plaintiff’s claims set forth in his amended  
15 complaint (docket #11) **MAY PROCEED**.

16 **IT IS FURTHER ORDERED** that defendant(s) shall file and serve an answer or other  
17 response to the complaint within **thirty (30) days** following the date of the early inmate mediation. If  
18 the court declines to mediate this case, an answer or other response shall be due within **thirty (30) days**  
19 following the order declining mediation.

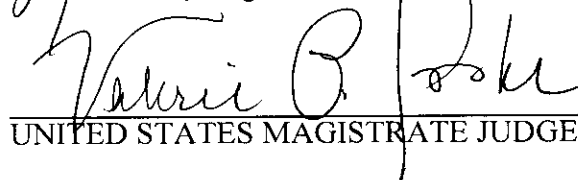
20 **IT IS FURTHER ORDERED** that the parties **SHALL DETACH, COMPLETE, AND**  
21 **FILE** the attached Notice of Intent to Proceed with Mediation form on or before **thirty (30) days** from  
22 the date of entry of this order.

23 **IT IS FURTHER ORDERED** that henceforth, plaintiff shall serve upon defendants, or,  
24 if an appearance has been made by counsel, upon their attorney(s), a copy of every pleading, motion, or  
25 other document submitted for consideration by the Court. Plaintiff shall include with the original paper  
26 submitted for filing a certificate stating the date that a true and correct copy of the document was mailed

1 to the defendants or counsel for defendants. If counsel has entered a notice of appearance, the plaintiff  
2 shall direct service to the individual attorney named in the notice of appearance, at the address stated  
3 therein. The Court may disregard any paper received by a district judge or a magistrate judge that has  
4 not been filed with the Clerk, and any paper which fails to include a certificate showing proper service.

5 **IT IS FURTHER ORDERED** that plaintiff's motion for service (docket #12) is  
6 **DENIED.**

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9 DATED this 16<sup>th</sup> day of November, 2010.

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12 UNITED STATES MAGISTRATE JUDGE  
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Name \_\_\_\_\_

Prison Number \_\_\_\_\_

Address \_\_\_\_\_  
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 \_\_\_\_\_

UNITED STATES DISTRICT COURT  
 DISTRICT OF NEVADA

\_\_\_\_\_, )  
 Plaintiff, )  
 v. )  
 \_\_\_\_\_ )  
 \_\_\_\_\_ )  
 Defendants. )

Case No. \_\_\_\_\_

**NOTICE OF INTENT TO  
 PROCEED WITH MEDIATION**

This case may be referred to the District of Nevada's early inmate mediation program. The purpose of this notice is to assess the suitability of this case for mediation. Mediation is a process by which the parties meet with an impartial court-appointed mediator in an effort to bring about an expedient resolution that is satisfactory to all parties.

1. Do you wish to proceed to early mediation in this case? \_\_\_\_ Yes \_\_\_\_ No
2. If no, please state the reason(s) you do not wish to proceed with mediation? \_\_\_\_\_

3. List any and all cases, including the case number, that plaintiff has filed in federal or state court in the last five years and the nature of each case. (Attach additional pages if needed).

- 1 4. List any and all cases, including the case number, that are currently pending or any pending  
2 grievances concerning issues or claims raised in this case. (Attach additional pages if needed).

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6 5. Are there any other comments you would like to express to the court about whether this case is  
7 suitable for mediation. You may include a brief statement as to why you believe this case is  
8 suitable for mediation. (Attach additional pages if needed).

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11 **This form shall be filed with the Clerk of the Court on or before thirty (30) days from the**  
12 **date of this order.**

13 Counsel for defendants: By signing this form you are certifying to the court that you have  
14 consulted with a representative of the Nevada Department of Corrections concerning participation in  
15 mediation.

16 Dated this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

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19 Signature

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21 \_\_\_\_\_  
22 Name of person who prepared or  
23 helped prepare this document  
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